STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of FELICIA PETERSON, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

RICKY PETERSON,

Respondent-Appellant.

and

LISA R. COVEY and RICHARD LEWIS,

Respondents.

UNPUBLISHED
December 4, 2003

No. 247424
Kent Circuit Court
Family Division
LC No. 90-031002-NA

In the Matter of FELICIA PETERSON AND KAYLA COVEY, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LISA R. COVEY,

Respondent-Appellant,

and

RICKY PETERSON and RICHARD LEWIS,

Respondents.

No. 247479
Kent Circuit Court
Family Division
LC No. 90-031002-NA

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

In Docket No. 247424, respondent-appellant Ricky Peterson appeals as of right from a family court order terminating his parental rights to the minor child Felicia Peterson pursuant to MCL 712A.19b(3)(g). In Docket No. 247479, respondent-appellant Lisa R. Covey voluntarily terminated her parental rights to Felicia Peterson and Kayla Covey. She sought rehearing and appeals by delayed leave granted from the order terminating her parental rights.[1] We affirm.

Docket No. 247424

Respondent Ricky Peterson argues that the trial court clearly erred in terminating his parental rights to Felicia Peterson and further maintains that he was denied due process because the trial court failed to appoint counsel for him at the onset of the proceedings.

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination listed in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1993). Once a statutory ground has been established by clear and convincing evidence, the court shall order termination of parental rights unless the court finds from evidence on the whole record that termination is clearly not in the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). The trial court's decision is reviewed for clear error. *Id.* at 356-357. A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a firm and definite conviction a mistake was made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). In applying the clearly erroneous standard, regard must be given to the special opportunity of the trial court to assess the credibility of the witnesses who appeared before it. MCR 2.613(C); *Miller, supra* at 337.

The issue whether respondent's due process rights were denied by failure to appoint counsel is a constitutional question, which this Court reviews de novo. *In re AH*, 245 Mich App 77, 79; 627 NW2d 33 (2001).

Respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(g), which provides:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care and custody for the child and there is no reasonable expectation that the parent will be

[1] The circuit court also terminated the parental rights of Kayla Covey's father, Richard Lewis, but he has not appealed that decision and is not a party to this appeal.

able to provide proper care and custody within a reasonable time considering the child's age.

Here, respondent testified that he was in prison when Felicia was born. Felicia was twelve years old at the time of the termination hearing. Of the twelve years of her life, respondent had spent over ten of those years in prison and, in fact, he was incarcerated throughout the instant proceedings.[2] Although respondent testified that he supported Felicia for the year and a half he was out of prison, he had not maintained contact with her during the pendency of these proceedings. Respondent admitted that he had never made any attempt to work with petitioner on a parent-agency agreement. Respondent proposed that Felicia be placed with his sister as her guardian. However, he conceded that even if he was granted parole in December 2003, he would need at least six months after his release to establish a home for Felicia. Moreover, there was no guarantee that respondent would be released at that time; December 2003 was simply the first date that he would be eligible for parole consideration.

The caseworker opined at the termination hearing that if respondent were to get out of prison soon, placing Felicia with him would expose her to a significant or substantial risk of harm. She recommended termination of respondent's parental rights based on his criminal history, his earliest release date, and the fact that it would take a substantial amount of time for him to complete a parent/agency agreement.

Under these circumstances, we conclude that the trial court did not err in terminating respondent's parental rights pursuant to MCL 712A.19b(3)(g). Given respondent's criminal record and current incarceration, his minimal contact with Felicia throughout her life, and her stated desire to have no further contact with respondent, the trial court did not clearly err in finding that termination would not be against Felicia's best interests. *In re Trejo Minors, supra.*

Respondent next argues that he was denied due process by the trial court's failure to appoint counsel for him at the onset of the case. Defendant complains that he was not a party to the initial adjudication and termination proceeding against the children's mother. Respondent argues that if he had been afforded counsel at this stage of the proceedings, he could have participated more effectively, and his proposed plan to establish a guardianship for the children with his sister as guardian could have been successful, thereby alleviating the need for the termination proceeding.

The record indicates that at the initial adjudication held on August 21, 2002, the court made the children temporary wards. Respondent was not present for this hearing and was not represented by an attorney, even though it is undisputed that he had been given notice of the hearing and was notified on July 22, 2002, that he had the right to an attorney and, if he could

[2] Respondent was serving time in prison for second-degree home invasion, and had prior convictions for possession of contraband, absconding, larceny from a motor vehicle, breaking and entering, and third-degree child abuse.

not afford one, he needed to notify the court immediately.[3] Respondent did not do so, but instead filed a *pro per* petition for limited guardianship of Felicia, whereby his sister would serve as guardian. On January 14, 2003, the court appointed counsel for respondent. His termination hearing was held on February 3, 2003. At that hearing, respondent's counsel sought rehearing of the disposition making Felicia a court ward, based on the limited guardian petition respondent had filed. The court denied rehearing, finding that the petition had not been timely filed and that respondent had been able to obtain counsel. As noted above, the court thereafter terminated respondent's parental rights.

MCR 5.915(B)[4] provides:

> (B) Child Protective Proceedings
>
> (1) Respondent
>
> (a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
>
> (i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and
>
> (ii) if the respondent is not represented by an attorney, that the respondent may request and receive a court-appointed attorney at any later hearing.
>
> (b) When it appears to the court, following an examination of the record, through written financial statements, or through other means that the respondent is financially unable to retain an attorney and the respondent desires an attorney, the court shall appoint one to represent the respondent at any hearing conducted pursuant to these rules.

In *In re Hall*, 188 Mich App 217; 469 NW2d 56 (1991), the court entered an order terminating the parental rights of the respondent to her minor children. Before her review hearing, the respondent had been represented by appointed counsel, who appeared at various hearings on the respondent's behalf. However, at the review hearing, the probate court relieved the attorney of his duties after the attorney advised the court that he did not know his client's

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[3] Respondent was not a party to, or necessary to, the proceedings involving the children's mother's voluntary termination. Petitioner was not required to proceed against both parents at the initial adjudication. See *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002).

[4] Effective May 1, 2003, the court rules governing proceedings regarding juveniles were amended and moved to new subchapter 3.900. The provisions of MCR 5.915 are now found in MCR 3.915. In this opinion, we refer to the rules in effect at the time of the order terminating parental rights.

whereabouts, had not been in contact with her for over sixteen months, and did not know her wishes. The court thereafter chose to proceed and took new testimony in the case. The respondent appealed, arguing that the taking of this new testimony in the absence of counsel warranted reversal. This Court disagreed, stating in pertinent part:

> [W]e reject the respondent's assertion that MCR 5.915(B) preserved the requirement . . . that a court sua sponte must appoint counsel at all hearings where termination has become a possibility. Significantly, the rule no longer requires that counsel be appointed upon "the court's own motion." As recognized by the trial court, *MCR 5.915(B) charges parents with "some minimum responsibility" in regard to having counsel appointed for their benefit. We agree and hold that MCR 5.915(B) requires affirmative action on the part of a respondent in order to have an attorney appointed at statutory review proceedings.* [*Id*. at 222 (emphasis added).]

Applying *Hall* to the instant case, we conclude that it was respondent's responsibility under MCR 5.915(B) to affirmatively act and seek appointed counsel when he received the written notice of his right to counsel in July 2002. Respondent failed to do so and thus cannot now complain that he was denied his due process rights. Respondent's argument in this regard is therefore without merit.

Docket No. 247479

Respondent Lisa R. Covey contends that the trial court erred when it summarily denied her motion for rehearing without holding an evidentiary hearing. We disagree.

On August 21, 2002, respondent entered a plea of admission to a petition seeking termination of her parental rights to Felicia Peterson and Kayla Covey. Respondent admitted that her parental rights to another child were terminated in 1991, that she tested positive for cocaine use on two occasions in May 2002, and that her criminal history impaired her ability to parent the minor children because in April and May of 2002 she was twice arrested and incarcerated and, indeed, remained incarcerated at the time the petition was authorized. Disposition of the case was adjourned for three months, with the understanding that if respondent did not make substantial progress within that period, petitioner would ask the court to terminate respondent's parental rights.

At the termination hearing held on November 21, 2002, respondent admitted to the factual allegations contained in a supplemental petition and acknowledged that she was unable to provide proper care and custody for the minor children. Respondent stated that she had come to the difficult and loving conclusion that the children's best interests would be served through adoption. The court held that respondent's decision to terminate was made "knowingly, understandingly, and voluntarily" and entered an order terminating her parental rights.

Thereafter, on December 6, 2002, respondent sent a letter to the trial judge stating that she had made a "terrible mistake" in admitting to the termination petition, and that she would like another chance to demonstrate her ability to parent the children. Respondent also included with her letter a statement from a psychologist with whom she had been counseling, in which the psychologist stated that it appeared to her that respondent was confused about some legal issues.

The psychologist noted that respondent had been working hard to be a better parent through parenting classes and that respondent was "highly distressed" by the decision she made to voluntarily terminate her parental rights.

The record indicates that the trial court treated these two letters as a motion for rehearing of the voluntary termination and, without holding a hearing, entered an order denying rehearing. Respondent now contends that the trial court erred in summarily denying her rehearing motion without the benefit of an evidentiary hearing. Specifically, she contends that "due to the eleven-year time span between the termination of her parental rights to her first child, and the petition in the instant case, along with new information presented after she relinquished her parental rights, substantial injustice will result if this case is not remanded for an evidentiary hearing."

The decision of the trial court to deny a motion for rehearing is reviewed for an abuse of discretion. *In re Burns*, 236 Mich App 291, 293; 599 NW2d 783 (1999); *In re Curran*, 196 Mich App 380, 385; 493 NW2d 454 (1993). MCR 5.992(A)[5] states in pertinent part that a motion for rehearing "will not be considered unless it presents a matter not previously presented to the court, or presented but not previously considered by the court, which, if true, would cause the court to reconsider the case." MCR 5.992(E) further provides that "*The court need not hold a hearing before ruling on a motion [for rehearing]*." [Emphasis added.]

The fact that a parent has had a change of heart and regrets his or her decision to consent to termination does not constitute a sufficient basis to grant rehearing. *In re Curran*, *supra* at 385.

Here, we conclude that the trial court did not abuse its discretion by denying respondent's motion for rehearing. Clearly, the court rule, MCR 5.992(E), *supra*, does not require a hearing on respondent's motion. Moreover, nothing more than a change of heart is alleged in respondent's letter. The only new information contained in the letter is respondent's statement that she had been sober for forty days and that she believed that she had passed a parenting class. Respondent had already admitted to drug use, a history of frequent incarcerations, and the previous termination of her parental rights to another child. Significantly, respondent in her letter does not dispute these factual allegations that formed the basis for the termination petition. Further, respondent does not claim that she was coerced in any way into entering her plea, or that she did not understand what the effect of her plea would be.

Although the psychologist, in her letter to the trial judge, opined that respondent was apparently confused about some legal issues, respondent makes no such claim in her letter, and the psychologist's subjective impression that respondent did not have the opportunity to ask questions of her attorney about the proceedings and her rights is refuted by the record of the termination hearing. The trial court advised respondent of both her right to a hearing and the fact that admitting to the petition would result in her losing all parental rights to the children. In response to the trial court's inquiry whether respondent truly understood the nature of the

[5] Now MCR 3.992(A).

proceedings and the consequences of her decision to terminate her parental rights, her counsel indicated on the record that

> * * *Ms. Covey and I have had several conversations in the weeks preceding this hearing, and also today we have had numerous conversations. Lisa does understand the rights that she's giving up to Felicia and Kayla. It is a very difficult decision for her to make today, but she's doing it knowingly, voluntarily, and lovingly.

Under these circumstances, where it is clear from respondent's letter that she simply changed her mind, we find no abuse of discretion in the trial court's decision to deny respondent's motion for a rehearing without holding an evidentiary hearing. MCR 5.992(A), (E); *In re Curran, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray